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No. 72-6160

In the Supreme Court of the United States

OCTOBER TERM, 1973

LAWRENCE MITCHELL,

Petitioner,

v.

W. T. GRANT COMPANY,

Respondent.

MOTION FOR PERMISSION TO FILE BRIEF ON MERITS AFTER ARGUMENT ON BEHALF OF THE STATE OF LOUISIANA

May it Please the Court:

The Attorney General of the State of Louisiana, in accordance with Rule 42 of this Court, moves that he be permitted to file this brief on the merits after argument.

That this cause involves certain basic laws of property rights of the Civil Law State of Louisiana which are of major concern to its citizens.

Your mover respectfully requests that this brief be accepted and considered by the Court.

WILLIAM J. GUSTE, JR.,
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CERTIFICATE

I hereby certify that copies of the above motion and of the accompanying brief have been duly served on counsel of record in this cause by transmitting the same to them by United States Mail in accordance with the rules of this Court, postage prepaid, at their record respective addresses.

, 1974

LOUIS M. JONES
Assistant Attorney General

No. 72-6160

In the Supreme Court of the United States

OCTOBER TERM, 1973

LAWRENCE MITCHELL,
Petitioner,

v.

W. T. GRANT COMPANY,
Respondent.

BRIEF ON THE MERITS ON BEHALF OF THE STATE OF LOUISIANA

May it Please the Court:

The undersigned attorney general of the State of Louisiana respectfully files herein a supplemental brief in order to set forth certain basic law applicable, uniquely, to the State of Louisiana. It appears that, at the time of oral argument, the court did not have the benefit of experienced Louisiana counsel.[1]

I.

THE SALE

Under the civil law of Louisiana title passes to the purchaser when there has been an agreement on the price and the thing.[2] Unlike the common law, title

[1] U. S. Law Week, 42 L. W. 3346, Cols. 3 & 4.

[2] La. Civil Code Article 2439

can not be held by the vendor until he has received full payment. A Louisiana purchaser has title and possession regardless of the fact that he may not have paid any portion of the price at the time of sale.[3]

The Louisiana vendor's privilege is "*sui generis*".[4] There is no necessity for recordation, and it exists only so long as the property remains in the possession of the purchaser. It is easily defeated by transfer. There is no requirement that the debtor notify his creditor of a proposed transfer from his possession.[5]

II.

THE LOUISIANA SEQUESTRATION REMEDY DOES NOT VIOLATE DUE PROCESS BY NOT PROVIDING FOR JUDICIAL NOTICE

Sequestration can only be used to preserve a privilege when it is within the power of the defendant to

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[3] La. Civil Code Article 2456; *Barber Asphalt Pav. Co. v. St. Louis Cypress Co.*, 1908, 121 La. 152, 46 So. 193—"A so-called conditional sale, or sale by which the vendee is to become at once unconditionally bound for the price, and the vendor is to continue to be the owner of the property until the price is paid, is not possible under the laws of this state. A petition wherein the vendor under such a contract claims the ownership of the property sold shows no cause of action."

[4] La. Civil Code Article 3217, 3227; *W. T. Grant Co. v. Mitchell*, 1972, 263 La. 627, 269 So.2d 186 @ 189—"As understood in our law, the vendor's privilege does not exist at common law. It is distinguished from the common law vendor's lien, which the vendor loses when he delivers possession of the article sold to the vendee."

[5] Margolin, Vendor's Privilege, 4. Tulane Law Review 237 (1929); Daggett, Louisiana Privileges and Chattel Mortgages, p. 91 (1942).

conceal, dispose of, or waste the property or revenues therefrom, or remove the property from the parish, during pendency of the action.[6]

The debtor receives notice of his default from the vendor desiring to exercise his vendor's privilege. If he did not furnish notice, his suit would be subject to an exception of prematurity.[7] If the vendor fails to promptly *put his debtor in default* he can be considered to have waived his right to proceed.[8] There is actual notice, but not judicial notice. Can judicial notice be said to be any greater warning than legal notice?

About the only thing the debtor can say is that—*'he didn't know the gun was loaded'*. At the summary hearing, on his own motion, the best the debtor in this cause could do was stipulate that the vendor's lien existed on the sequestered property.[9]

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[6] La. Code of Civil Procedure, Article 3571

[7] La. Code of Civil Procedure, Article 423

[8] Sarpy, *The Putting In Default As A Prerequisite To Suit In Louisiana, 1 Loyola Law Review 127 (1942) @ 127*— "The doctrine known as the 'putting in default' is one of the quaint precepts of the Civil Code of Louisiana which can be classed as unique in the legal institutions of the United States of America. ------"

Ibid. @ 128 "Putting in default may be appropriately described as a guardian of fair play between parties to contracts which lack conciseness as to the necessity for timely performance. The putting in default, by nature, is directly related to the field of adjective law. It is a mandate of the Civil Code of Louisiana by which a creditor must call upon the debtor to perform before drawing the debtor into litigation for redress sounding in breach."

Louisiana Civil Code, Articles 1911-14; 1933.

[9] Respondent's Brief, page 8

Judicial notice is not due process, nor does due process mean judicial notice. There is no set standard of application. A doctrine of fairness to both, in view of all considered circumstances, produces due process.[10]

III.

THE LOUISIANA CONSERVATORY WRIT OF SEQUESTRATION PROVIDES AN OPPORTUNITY FOR A HEARING AND IS NOT VIOLATIVE OF DUE PROCESS

Sequestration issues only on the order of a judge and not an administrative officer. A bond is furnished by the creditor in an amount sufficient to protect the defendant against damages and attorney's fees resulting from wrongful issue. Ordinarily the petition and verified affidavit are filed at the same time. The Judge determines that the grounds relied on for the issuance of the writ clearly appear from the pleadings before issuing his order.[11]

If the debtor has wrongfully been deprived of his property for any valid reason, he can by summary process have the writ dissolved. It is important to note that at a summary hearing the *seizing creditor has the burden of proof to establish that the writ was properly issued.*[12] The debtor can defeat the writ, if there was error in fact or law in either the procedural or substan-

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[10] *Ownbey v. Morgan*, 256 U.S. 94, 110 (1921)

[11] La. Code of Civil Procedure, Article 3501, 3502

[12] La. Code of Civil Procedure, Article 3506; *C. A. Kaufman Co., Ltd. v. Gregory*, 244 La. 766, 154 So. 2d 392 (1963)

tive basis for the action. For example, prematurity, novation, payment, improper process, faulty pleading, inadequate surety, jurisdiction, parties, etc.—all are bases for dissolution of the writ. If the debtor is successful, his property is returned to him, and he can pursue his right to damages and attorney's fees.[13]

Sequestration merely *preserves* the property in accordance with the allegations of the creditor. A final judgment must issue against the debtor, and then the property can only be sold to satisfy the judgment. The court orders the issuing of a writ of fieri facias which, ultimately results in a sheriff's sale after judicial appraisal.

IV.

FUENTES AND *MITCHELL* ARE READILY DISTINGUISHABLE

Fuentes is concerned with common law conditional sales contracts[14]—*Mitchell* with the Louisiana civil law of contract. In *Fuentes* the vendor still has the title to the chattel. He has a *'leash'* on his debtor. The debtor can not dispose of the property to the detriment of his creditor. The creditor holds title and in a replevin action he seeks possession of the chattel to satisfy the debt.

In *Mitchell* the vendor has only an unrecorded privilege (lien), known as the *'vendor's privilege'* arising solely out of the transaction between vendor and

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[13] *C. A. Kaufman Co., Ltd. v. Gregory*, supra.

[14] *Fuentes v. Shevin*, 407 U.S. 67 (1972)

purchaser. It is a basic right of the sales contract law of Louisiana and is '*sui generis*'.[15] The debtor has title and possession as a result of the sale. The vendor has only a privilege (lien), and then only so long as the chattel remains in the possession of the debtor. There is no requirement that the debtor retain possession or that he notify his vendor-creditor that he is going to transfer possession to another. He is free to sell or transfer to any other creditor; further, he could sell and keep the money. Sequestration is a conservatory writ under the supervision of the courts. The vendor still must prove his claim.

In *Fuentes* the owner of the property is merely regaining possession by using the administrative procedures of the sheriff's office. For all practical purposes in 98% of the cases the litigation is at an end.

In *Mitchell* title and possession are in the hands of a debtor who has been placed in default by his creditor in accordance with Louisiana law. To require a further judicial notice of default, as well as a hearing, results in an improper balancing of the equities of due process in favor of the debtor.[16]

V.

FUENTES A THREAT TO CREDIT SALES IN LOUISIANA

If the rule of *Fuentes* is applied to the present case to require a prior judicial notice and hearing in a Lou-

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[15] *W. T. Grant Co. v. Mitchell*, supra.

[16] *Hurtado v. California*, 110 U.S. 531 (1884)

isiana sequestration proceeding, credit sales will be drastically reduced. The result will be to greatly curtail credit transactions to marginal income purchasers.

Louisiana has been unwilling to adopt the Uniform Commercial Code with its self-help provisions. It prefers its Civil Code with a property system vastly different from that of common law jurisdictions.[17]

This Louisiana case fits precisely the exception of *Fuentes* which holds that there may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods. For this reason the Louisiana Supreme Court was of the opinion, among others, that the requirement of due process had been satisfied.[18]

CONCLUSION

It is respectfully submitted that the Louisiana civil law affords greater security and due process to

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[17] 26 Louisiana Law Review 189 (1966); 18 Louisiana Bar Journal 251 (1971).

[18] *W. T. Grant Co. v. Mitchell*, supra.—"The law of vendor's privilege in this state operates to favor the vendor and the vendee alike. The long history of vendor's privilege in Louisiana demonstrates that it enables the purchaser to acquire property he may otherwise be unable to buy as much as it induces the vendor to sell. Without the benefits accorded the vendor, it may well be concluded that in a substantial number of instances the possession and title to property would not be surrendered to prospective purchasers. Because of it, many impecunious citizens are enabled to acquire property to foster livelihood and provide for their sustenance."

the debtor than is available in common law jurisdictions and that *Fuentes* is not applicable to this cause.

Respectfully submitted,

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B-4556, 2-74

MITCHELL *v.* W. T. GRANT CO.

CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 72-6160. Argued December 4, 1973—Decided May 13, 1974

The Louisiana Code of Civil Procedure makes available to a mortgage or lien holder a writ of sequestration to forestall waste or alienation of the encumbered property. While the writ is obtainable on the creditor's *ex parte* application without notice to the debtor or an opportunity for hearing, the writ will issue only upon a verified affidavit and upon a judge's authority (with respect to the parish involved in this case) after the creditor has filed a sufficient bond. The debtor may immediately seek dissolution of the writ, which must be ordered unless the creditor proves the grounds for issuance (existence of the debt, lien, and delinquency), failing which the court may order return of the property and assess damages, including attorney's fees, in the debtor's favor. Respondent seller filed suit against petitioner in the New Orleans City Court for the overdue balance of the price of certain personal property that petitioner had purchased under an installment sales contract and on which respondent had a vendor's lien. On respondent's application, the trial judge in accordance with the Louisiana procedure ordered sequestration of the property without prior notice or opportunity for a hearing, and denied petitioner's motion to dissolve the writ on the asserted ground, *inter alia*, that the seizure violated the Due Process Clause of the Fourteenth Amendment. The appellate courts affirmed. *Held:* The Louisiana sequestration procedure is not invalid, either on its face or as applied, and, considering the procedure as a whole, it effects a constitutional accommodation of the respective interests of the buyer and seller by providing for judicial control of the process from beginning to end, thus minimizing the risk of the creditor's wrongful interim possession, by protecting the debtor's interest in every way except to allow him initial possession, and by putting the property in the possession of the party who is able to furnish protection against loss or damage pending trial on the merits. *Fuentes* v. *Shevin*, 407 U. S. 67, distinguished. Pp. 603-620.

263 La. 627, 269 So. 2d 186, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 623. BRENNAN, J., filed a dissenting statement, *post*, p. 636. STEWART, J., filed a dissenting opinion in which DOUGLAS and MARSHALL, JJ., joined, and in which BRENNAN, J., joined in part, *post*, p. 629.

Robert J. Hobbs argued the cause for petitioner. With him on the briefs was *John W. Reed.*

Thomas J. O'Sullivan argued the cause for respondent. With him on the brief was *Marshall J. Favret.**

MR. JUSTICE WHITE delivered the opinion of the Court.

In this case, a state trial judge in Louisiana ordered the sequestration of personal property on the application of a creditor who had made an installment sale of the goods to petitioner and whose affidavit asserted delinquency and prayed for sequestration to enforce a vendor's lien under state law. The issue is whether the sequestration violated the Due Process Clause of the Fourteenth Amendment because it was ordered *ex parte*, without prior notice or opportunity for a hearing.

I

On February 2, 1972, respondent W. T. Grant Co. filed suit in the First City Court of the City of New Orleans, Louisiana, against petitioner, Lawrence Mitchell. The petition alleged the sale by Grant to Mitchell of a refrigerator, range, stereo, and washing machine, and an overdue and unpaid balance of the purchase price for said items in the amount of $574.17. Judgment for

**William J. Guste, Jr.*, Attorney General, *Warren E. Mouledoux*, First Assistant Attorney General, and *Louis M. Jones*, Assistant Attorney General, filed a brief for the State of Louisiana as *amicus curiae*.

that sum was demanded. It was further alleged that Grant had a vendor's lien on the goods and that a writ of sequestration should issue to sequester the merchandise pending the outcome of the suit. The accompanying affidavit of Grant's credit manager swore to the truth of the facts alleged in the complaint. It also asserted that Grant had reason to believe petitioner would "encumber, alienate or otherwise dispose of the merchandise described in the foregoing petition during the pendency of these proceedings, and that a writ of sequestration is necessary in the premises." Based on the foregoing petition and affidavit, and without prior notice to Mitchell or affording him opportunity for hearing, the judge of the First City Court, Arthur J. O'Keefe, then signed an order that "a writ of sequestration issue herein" and that "the Constable of this court sequester and take into his possession the articles of merchandise described in the foregoing petition, upon plaintiff furnishing bond in the amount of $1,125." Bond in that amount having been filed by the respondent, the writ of sequestration issued, along with citation to petitioner Mitchell, citing him to file a pleading or make appearance in the First City Court of the city of New Orleans within five days. The citation recited the filing of the writ of sequestration and the accompanying affidavit, order, and bond. On March 3 Mitchell filed a motion to dissolve the writ of sequestration issued on February 2.[1] The motion asserted that the personal property at issue had been seized under the writ on February 7, 1972, and claimed, first, that the goods were exempt from seizure under state law and, second, that the seizure violated the Due Process Clauses of the State and Federal Constitutions

[1] The motion asked for dissolution of the writ with respect to the refrigerator, stove, and washer. For some reason, unexplained by the parties, the motion was not addressed to the stereo.

in that it had occurred without prior notice and opportunity to defend petitioner's right to possession of the property.[2] The motion came on for hearing on March 14. It was then stipulated that a vendor's lien existed on the items, arguments of counsel were heard, and on March 16 the motion to dissolve was denied. The goods were held not exempt from seizure under state law. The trial court also ruled that "the provisional seizure enforced through sequestration" was not a denial of due process of law. "To the contrary," the trial judge said, "plaintiff insured defendant's right to due process by proceeding in accordance with Louisiana Law as opposed to any type of self-help seizure which would have denied defendant possession of his property without due process." The appellate courts of Louisiana refused to disturb the rulings of the trial court, the Supreme Court of Louisiana expressly rejecting petitioner's due process claims pressed under the Federal Constitution. 263 La. 627, 269 So. 2d 186 (1972). We granted certiorari, 411 U. S. 981 (1973), and now affirm the judgment of the Louisiana Supreme Court.

II

Petitioner's basic proposition is that because he had possession of and a substantial interest in the sequestered property, the Due Process Clause of the Fourteenth Amendment necessarily forbade the seizure without prior notice and opportunity for a hearing. In the circumstances presented here, we cannot agree.

[2] There is some dispute between the parties as to when the writ was actually executed by the sheriff. The sheriff's return, furnished by petitioner but apparently not in the record below, indicates that execution was on the 18th of February, rather than on the 7th. The Louisiana Supreme Court assumed that the writ was executed on the 7th. Because we see no legal consequence attaching to a choice of dates, we assume for purposes of decision that the writ was executed on the 7th.

Petitioner no doubt "owned" the goods he had purchased under an installment sales contract, but his title was heavily encumbered. The seller, W. T. Grant Co., also had an interest in the property, for state law provided it with a vendor's lien to secure the unpaid balance of the purchase price. Because of the lien, Mitchell's right to possession and his title were subject to defeasance in the event of default in paying the installments due from him. His interest in the property, until the purchase price was paid in full, was no greater than the surplus remaining, if any, after foreclosure and sale of the property in the event of his default and satisfaction of outstanding claims. See La. Code Civ. Proc. Ann., Art. 2373 (1961).[3] The interest of Grant, as seller of the property and holder of a vendor's lien, was measured by the unpaid balance of the purchase price. The monetary value of that interest in the property diminished as payments were made, but the value of the property as security also steadily diminished over time as it was put to its intended use by the purchaser.

Plainly enough, this is not a case where the property sequestered by the court is exclusively the property of the defendant debtor. The question is not whether a debtor's property may be seized by his creditors, *pendente lite*, where they hold no present interest in the property sought to be seized. The reality is that both seller and buyer had current, real interests in the property, and the definition of property rights is a matter of state law. Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well.

With this duality in mind, we are convinced that the

[3] Article 2373 and other pertinent provisions of the Code, including those referred to in the text, are set out in the Appendix to this opinion.

Louisiana sequestration procedure is not invalid, either on its face or as applied. Sequestration under the Louisiana statutes is the modern counterpart of an ancient civil law device to resolve conflicting claims to property. Historically, the two principal concerns have been that, pending resolution of the dispute, the property would deteriorate or be wasted in the hands of the possessor and that the latter might sell or otherwise dispose of the goods. A minor theme was that official intervention would forestall violent self-help and retaliation. See Millar, Judicial Sequestration in Louisiana: Some Account of Its Sources, 30 Tul. L. Rev. 201, 206 (1956).

Louisiana statutes provide for sequestration where "one claims the ownership or right to possession of property, or a mortgage, lien, or privilege thereon . . . if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action." Art. 3571. The writ, however, will not issue on the conclusory allegation of ownership or possessory rights. Article 3501[4] provides that the writ of sequestration shall issue "only when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts" shown by a verified petition or affidavit. In the parish where this

[4] Historically, the writ would issue only if the creditor had "good reason to fear" that the debtor would damage, alienate or waste the goods, and the creditor was required to show the grounds for such fear. Under present law, however, the apprehension of the creditor is no longer the issue, and the writ may be obtained when the goods are within the power of the debtor. Reporter's Comment (a) to La. Code Civ. Proc. Ann., Art. 3571. The necessity of showing such "power" is not irrelevant, because the vendor's privilege will not lie against goods not within the "power" of the debtor. Margolin, Civil Law, Vendor's Privilege, 4 Tul. L. Rev. 239 (1930); H. Daggett, On Louisiana Privileges and Chattel Mortgages § 51 (1942).

case arose, the clear showing required must be made to a judge,[5] and the writ will issue only upon his authorization and only after the creditor seeking the writ has filed a sufficient bond [6] to protect the vendee against all damages in the event the sequestration is shown to have been improvident.[7] Arts. 3501 and 3574.

The writ is obtainable on the creditor's *ex parte* application, without notice to the debtor or opportunity for a hearing, but the statute entitles the debtor immediately to seek dissolution of the writ, which must be ordered unless the creditor "proves the grounds upon which the writ was issued," Art. 3506, the existence of the debt, lien, and delinquency, failing which the court may order return of the property and assess damages in favor of the debtor, including attorney's fees.[8]

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[5] Articles 282 and 283 of the Code provide, generally, that the court clerk may issue writs of sequestration. But Art. 281 confines the authority to the judge in Orleans Parish. There is no dispute in this case that judicial authority for the writ was required and that it was obtained as the statute requires. The validity of procedures obtaining in areas outside Orleans Parish is not at issue.

[6] As previously noted, the judgment prayed for in this case was in the amount of $574.17. Grant was ordered to furnish security in the amount of $1,125.

[7] When a writ is issued by the judge, it is served upon the debtor by the sheriff, Art. 3504, who thereafter becomes responsible for the property's safekeeping. See Johnson, Attachment and Sequestration: Provisional Remedies Under the Louisiana Code of Civil Procedure, 38 Tul. L. Rev. 1, 21–22 (1963). The plaintiff-creditor, however, see Art. 3576, may himself take possession of the goods if the defendant within 10 days does not secure possession of the goods by posting his own bond as permitted by Art. 3507, but he has no right to sell the goods until final judgment on the merits. Art. 3510.

[8] Damages would compensate for the period during which the buyer was deprived of the use of the property, but are not restricted to pecuniary loss. They may encompass injury to social standing or reputation as well as humiliation and mortification. Johnson, *supra*, n. 7, at 28.

The debtor, with or without moving to dissolve the sequestration, may also regain possession by filing his own bond to protect the creditor against interim damage to him should he ultimately win his case and have judgment against the debtor for the unpaid balance of the purchase price which was the object of the suit and of the sequestration. Arts. 3507 and 3508.[9]

In our view, this statutory procedure effects a constitutional accommodation of the conflicting interests of the parties. We cannot accept petitioner's broad assertion that the Due Process Clause of the United States Constitution guaranteed to him the use and possession of the goods until all issues in the case were judicially resolved after full adversary proceedings had been completed. It is certainly clear under this Court's precedents that issues can be limited in actions for possession. Indeed, in *Grant Timber & Mfg. Co.* v. *Gray*, 236 U. S. 133 (1915) (Holmes, J.), the Court upheld such limitations in possessory actions for real property in Louisiana. See also *Bianchi* v. *Morales*, 262 U. S. 170 (1923); *Lindsey* v. *Normet*, 405 U. S. 56 (1972). Petitioner's claim must accordingly be narrowed to one for a hearing on the issues in the possessory action—default, the existence of a lien, and possession of the debtor—before property is taken.

As to this claim, the seller here, with a vendor's lien to secure payment of the unpaid balance of purchase price, had the right either to be paid in accordance with his contract or to have possession of the goods for the purpose of foreclosing his lien and recovering the unpaid balance. By complaint and affidavit, the seller swore

[9] The debtor's bond necessary to repossess the property "shall exceed by one-fourth the value of the property as determined by the court, or shall exceed by one-fourth the amount of the claim, whichever is the lesser." Art. 3508.

to facts that would entitle him to immediate possession of the goods under his contract, undiminished in value by further deterioration through use of the property by the buyer. Wholly aside from whether the buyer, with possession and power over the property, will destroy or make away with the goods, the buyer in possession of consumer goods will undeniably put the property to its intended use, and the resale value of the merchandise will steadily decline as it is used over a period of time. Any installment seller anticipates as much, but he is normally protected because the buyer's installment payments keep pace with the deterioration in value of the security. Clearly, if payments cease and possession and use by the buyer continue, the seller's interest in the property as security is steadily and irretrievably eroded until the time at which the full hearing is held.

The State of Louisiana was entitled to recognize this reality and to provide somewhat more protection for the seller. This it did in Orleans Parish by authorizing the sequestration of property by a judge. At the same time, the buyer being deprived of possession, the seller was required to put up a bond to guarantee the buyer against damage or expense, including attorney's fees, in the event the sequestration is shown to be mistaken or otherwise improvident. The buyer is permitted to regain possession by putting up his own bond to protect the seller. Absent that bond, which petitioner did not file in this case, the seller would be unprotected against the inevitable deterioration in the value of his security if the buyer remained in possession pending trial on the merits. The debtor, unlike the creditor, does not stand ready to make the opposing party whole, if his possession, pending a prior hearing, turns out to be wrongful.

Second, there is the real risk that the buyer, with possession and power over the goods, will conceal or

transfer the merchandise to the damage of the seller. This is one of the considerations weighed in the balance by the Louisiana law in permitting initial sequestration of the property. An important factor in this connection is that under Louisiana law, the seller's vendor's lien expires if the buyer transfers possession. It follows that if the vendor is to retain his lien, superior to the rights of other creditors of the buyer, it is imperative when default occurs that the property be sequestered in order to foreclose the possibility that the buyer will sell or otherwise convey the property to third parties against whom the vendor's lien will not survive. The danger of destruction or alienation cannot be guarded against if notice and a hearing before seizure are supplied. The notice itself may furnish a warning to the debtor acting in bad faith.

Third, there is scant support in our cases for the proposition that there must be final judicial determination of the seller's entitlement before the buyer may be even temporarily deprived of possession of the purchased goods. On the contrary, it seems apparent that the seller with his own interest in the disputed merchandise would need to establish in any event only the probability that his case will succeed to warrant the bonded sequestration of the property pending outcome of the suit. Cf. *Bell* v. *Burson*, 402 U. S. 535 (1971); *Ewing* v. *Mytinger & Casselberry*, 339 U. S. 594 (1950). The issue at this stage of the proceeding concerns possession pending trial and turns on the existence of the debt, the lien, and the delinquency. These are ordinarily uncomplicated matters that lend themselves to documentary proof; and we think it comports with due process to permit the initial seizure on sworn *ex parte* documents, followed by the early opportunity to put the creditor to his proof. The nature of the issues at stake minimizes the risk that the